

No. 12083
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

CUTTER LABORATORIES, INC.,

Appellant,

vs.

LYOPHILE-CRYOCHEM CORPORATION, ESSDEE PATENTS,
INC., and TABOR-OLNEY CORPORATION,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

The Scope of Review.

Appellees, in the principal argument set forth in their brief, have chosen to ignore the merits of their patents and have argued that the jury verdict forecloses review in this case. This view does not correspond with the case law set out hereinafter, and it is appellant's position that under the law controlling this case and in view of the undisputed facts and any inferences that might be drawn therefrom the case should never have gone to the jury in the first instance.

At the close of evidence, and pursuant to Rule 50 of the Federal Rules of Civil Procedure, appellant moved for a directed verdict in the instant case that claims 6, 11, 12 and 13 of the Reichel patent were invalid and not infringed, and that claims 4 and 5 of the Flosdorf *et al.*

patent were likewise invalid and not infringed. Following the verdict of the jury appellant, pursuant to said Rule 50 and pursuant to Rule 59, moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. Thus was put into issue that the patents as a matter of law were invalid and that as a matter of law the patents were not infringed.

The contention in appellees' brief is that the appeal of appellant from the denial of these motions is frivolous, but appellees concede throughout their brief that if the evidence be such that in view of the applicable rules of law but one reasonable conclusion could have been reached as to the validity or infringement of the patents in suit, the case should never have gone to the jury. It is appellant's position that such is precisely the case here.

While conceding the above general rule governing disposition of the issues of validity and infringement of the patents in suit by the court and not by the jury, *Brady v. Southern R. Co.*, 320 U. S. 476, 88 L. Ed. 239, appellees propose that the verdict of the jury in this case forecloses consideration of the merits of the respective patents by this court. In reaching this conclusion appellees appear to urge that: (1) The only rules of general applicability, *i. e.*, laws, controlling jury patent litigation, are those broad Congressional enactments constituting the patent statutes themselves. (2) Any evidence whatsoever which might serve to cause a jury to infer a "pattern" falling within the broad, literal terms of the patent statutes suffices to provide that reasonable area of factual conflict exclusively the province of the jury. (3) Once the jury purports to apply these naked statutes to that "pattern," appeal is frivolous and violative of the Seventh Amendment to the Constitution.

By this reasoning appellees assert that there are three factual questions presented here: (a) the presence or absence of invention; (b) the sufficiency of the patent language for the man skilled in the art; and (c) infringement. (Appellees' Brief, p. 24.) Appellees further assert that the only rules of general applicability, that is, of law, material to these questions are the literal language of three broad statutes, R. S. §4886 (35 U. S. C. §31), covering invention; R. S. §4888 (35 U. S. C. §33), covering the sufficiency of the patent language; and R. S. §4919 (35 U. S. C. §67), covering infringement. (Appellees' Brief, pp. 14, 16 and 21.) Finally, appellees assert the existence of evidence from which the jury could have and did conclude that these statutes rendered appellant liable, stating that since the jury did so conclude examination into the actual merits of the patents concerned is foreclosed.

This court will immediately recognize the inevitable consequence of this approach of appellees which is, of course, to render the jury the interpreter of our patent statutes, a result diametrically opposed to our system of jurisprudence.

Elmendorf v. Taylor, et al., 23 U. S. 152, 6 L. Ed. 289;

Miller v. Burger, 161 F. 2d 992 (C. C. A. 9).

Appellant agrees that a fact is a demonstrable happening and is for the jury; appellant agrees that a law is a rule of general applicability. Appellant submits, however, that in designating the naked patent statutes as the only rules of general applicability controlling jury action in a patent case, appellees' argument does violence to more than 100 years of judicial consideration, construc-

tion, interpretation and definition of the aforesaid statutes and their predecessors. If appellees' reasoning were adopted generally for the disposition of jury patent litigation, the consequences would be far-flung indeed. The century of organic growth through interpretation and definition of the patent statutes which has resulted in our present body of patent law would become a nullity whenever the patent holder chose to take his patent to a jury. Those standards of invention carefully raised by our judiciary apace with the ever wider and more complete dissemination and integration of our technical knowledge would be abandoned. There would exist for every patent two franchises of exclusion of variable effectiveness. One would be in "equity," another in "law," and the economy would be reduced to a state of complete uncertainty as to where legal monopoly leaves off and where free competition begins. Further, patent litigation would become purely *inter partes* and the public, whose interest in all patents and particularly in the assertion thereof is paramount, would lose the protection of the judiciary, which protection it has always had heretofore.

Katsinger v. Chicago Metallic Mfg. Co., 329 U. S. 394, 91 L. Ed. 374;

Mercoid Corporation v. Mid-Continent Investment Company, 320 U. S. 661, 88 L. Ed. 376;

Pope Mfg. Co. v. Gormully, 144 U. S. 224, 36 L. Ed. 414.

And, finally, each patent case inevitably going to the jury, those objectives of Rule 50 of the Federal Rules of Civil Procedure as set out in *Brady v. Southern R. Co.*, *supra*, would be lost.

For the purposes of this case, however, it is unnecessary to discuss these contentions of appellees further.

The statutes which they would have nakedly submitted to the jury have been considered, construed, interpreted and defined, and from these judicial processes there have grown the patent laws, the body of rules of general applicability whose materiality here appellees' reasoning denies. These patent laws define certain standards which any patent coming before the courts must meet, and these laws have been applied as vigorously in jury cases as in any other cases.

Thus the Supreme Court, in *Market Street Cable R. Co. v. Rowley*, 155 U. S. 621, 39 L. Ed. 284, reversed judgment on a jury verdict for plaintiff in a patent case, and held that the court below erred in failing to instruct the jury that the patent in suit was void for want of patentable novelty. In reaching this view the court refused to permit the jury to decide for itself the broad proposition as to whether the facts might have established novelty and invention under the broad, undefined terms of the statute, but, rather, applied as a standard to the facts of the case the rule of general applicability that "mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent." (155 U. S. 629.) It will be noted that in this case the one dissenting justice urged, as do appellees here, that the question was merely one for the jury, and failed to apply any legal standard whatsoever to the facts of the case.

In *The Black Diamond Coal Mining Company v. Excelsior Coal Company*, 156 U. S. 611, 39 L. Ed. 533, the court reversed a judgment for the patent owner on a jury verdict and held that under the facts the court should have directed a verdict for the defendant. The court did

not accede to the view of appellees here that infringement is to be treated as a matter of fact governed merely by the broad terms of the infringement statute (R. S. §4919, 35 U. S. C. §67), but applied to the facts the rule of law that there can be no infringement of a claim by a device which omits one of the elements of the claim.

And in *Singer Manufacturing Co. v. Cramer*, 192 U. S. 265, 24 S. Ct. 291, 48 L. Ed. 437, the court applied the familiar rule of law that words contained in a claim must be given due effect and must be construed to refer to elements in combination having substantially the form and constructed substantially as described in the specification and shown in the drawing (192 U. S. 285), reversing a judgment on a jury verdict for the patent owner and holding that under the facts the trial court should have granted a motion to direct a verdict for defendant.

Similarly, this court has never conceded that a patent need not meet the legal standards arrived at through judicial interpretation of the patent laws merely because such patent came before a jury. On the contrary, in *McRoskey v. Braun Mattress Co.*, 107 F. 2d 143 (C. C. A. 9), this court applied the rule set forth in *The Black Diamond Coal Mining Company* case, *supra*, that omission of a claimed element is fatal to a charge of infringement, and affirmed judgment of non-infringement entered upon a directed verdict for defendant. It will be noted that in that case plaintiff urged that testimony existed in the case to the effect that some of the claims in suit read upon the alleged infringing machine and that therefore submission of the issue to the jury was required. This

court rejected that contention, as it should reject comparable contentions of appellees in the instant case.

Finally, it is submitted that not only do the Supreme Court and this court refuse to eliminate from jury patent cases the interpretative standards evolved from the patent statutes by our courts, but the courts of the other Circuits likewise so refuse. In *The Alemite Company v. Jiffy Lubricator Company*, Appeals Nos. 13,835 and 13,840, the Court of Appeals for the Eighth Circuit, on August 17, 1949, in a case not yet reported, reversed a judgment on a jury verdict for plaintiff in a patent suit, ordering the District Court to enter a judgment dismissing plaintiff's claim that the patent in suit was valid and infringed. A motion of defendant for a directed verdict and a motion for judgment notwithstanding the verdict had both been denied by the court below. In disposing of the cause, the Court of Appeals stated:

"If the patent is clearly void, the verdict of the jury is, of course, of no help to the plaintiff and other questions need not be considered."

The court went on to observe that the standards of originality necessary to sustain a patent have recently been raised, citing decisions of the various circuits and of the Supreme Court, and finally said:

"Since it is our opinion that the evidence, viewed in the aspect most favorable to the plaintiff, does not sustain the conclusion that the Johnsons' contribution to the art of lubrication rose to the level of patentable invention, it is unnecessary to consider other questions."

And in *Refrigeration Patents Corporation v. Stewart-Warner Corporation*, 159 F. 2d 972 (C. C. A. 7), the Court of Appeals for the Seventh Circuit reversed a judgment on a jury verdict for the patent owner and held the patent invalid as a matter of law, applying the interpretation of R. S. §4888, 35 U. S. C. §33, laid down in *Halliburton Oil Well Cementing Co. v. Walker*, 329 U. S. 1, 91 L. Ed. 3, that the statute was not satisfied where a crucial element of the patented combination is described in the claim in terms of what it will do rather than in terms of its own physical characteristics or its arrangement in combination (and see the cases cited in Appellant's Opening Brief, p. 37).

These cases demonstrate clearly that the courts, in jury patent cases, will not look merely to the naked patent statutes as forming those legal standards by which the patent shall be measured. On the contrary, they demonstrate that those rules of general applicability found in judicial interpretation of the patent statutes and in the patent law in general shall control. Were it otherwise the mere presumption of validity attaching to every issued patent would take every case to the jury. That this is not true is manifest from the decisions above, and appellees have cited no authority whatsoever weakening said cases. The recent case of *The Alemite Company v. Jiffy Lubricator Company*, *supra*, demonstrates that patents in jury trials, as with all patents, must measure up to the standards set forth in our patent law, and appellees' patents must stand or fall on their merits.

II.

The Merits of the Case.

Tested by proper legal standards and in view of the clearly undisputed facts and any inferences which may be drawn therefrom, the judgment in the instant case is indefensible. Such judgment was on a general verdict and was in the amount of Seventy Thousand Nine Hundred and Twenty-two Dollars (\$70,922), two per cent (2%) of the total sales of the products manufactured under all of appellant's processes. Its effect is to confirm the monopoly of each of the patents in suit over each of appellant's processes, and to congeal this monopoly throughout the industry over any similar processes. It cannot be sustained if the Reichel patent is invalid, if the Flosdorf *et al.* patent is invalid, or if all the processes of appellant do not infringe both of said patents.

Appellees have been entirely unable to point out where in appellant's defenses of invalidity of the Reichel patent and of non-infringement thereof fail. Appellees have been entirely unable to point out where the defense of invalidity of the Flosdorf *et al.* patent fails. And appellees state only that some of appellant's processes have infringed said Flosdorf *et al.* patent.*

*Where a general verdict is based upon several grounds, and the several grounds are not all supported by the evidence, the Federal rule requires that the judgment on the verdict be reversed, as the reviewing court cannot know but that the verdict was based upon one or more of the unsupported grounds. *Wilmington Star Mining Company v. Fulton*, 205 U. S. 60, 51 L. Ed. 708; *Detroit, T. & I. R. Co. v. Banning*, 173 F. 2d 752 (C. C. A. 6); *Christian v. Boston & M. R. R.*, 109 F. 2d 103 (C. C. A. 2); *Buckeye Cotton Oil Co. v. Sloan*, 250 Fed. 712 (C. C. A. 8); *Patton v. Wells*, 121 Fed. 337 (C. C. A. 8). It will be noted that, in the instant case, the verdict is not such as can be affirmed in part and reversed in part.

The Reichel Patent:

To demonstrate that the Reichel patent in suit, and particularly claims 6, 11, 12 and 13 thereof, are invalid and not infringed, as tested by the law applied to the clear evidence and any inferences that might be drawn therefrom, appellant's opening brief made four points: (a) the so-called Reichel process, consisting of five steps, amounts to but the adding to an admittedly old drying process an old drying step without achieving any new function or result. Claims 6 and 12 of the Reichel patent but set forth a freeze-drying process well known at the time of the alleged Reichel invention, and claims 11 and 13 merely follow well-known freeze-drying with the well-known step of heating to dry under vacuum; (b) claims 6, 11, 12 and 13 of Reichel are incomplete, in failing to set out the five essential steps of the so-called Reichel process; (c) claims 6, 11, 12 and 13, and particularly claims 11 and 13, fail sufficiently to define the proper metes and bounds of the Reichel patent monopoly; (d) in failing to prove that appellant quickly or substantially instantaneously freezes its products appellees have failed to show infringement sufficient to support the verdict.

1. Appellees Have Failed to Point Out Wherein the So-called Reichel Process Is More Than Aggregation, Wherein Claims 6 and 12 Are Any More Than an Old Freeze-drying Process and Wherein Claims 11 and 13 Define More Than a Process Including an Old Drying Step Following an Old Drying Process.

The rule of law controlling appellant's defense of aggregation is that for invention to exist in a combination of old steps such combination must result not in a mere sum of old results, but in some new and different result.

Applying this rule to the clear facts of this case, appellant showed that beyond any reasonable doubt the so-called Reichel process did not involve invention and that claims 6, 11, 12 and 13 were invalid.

In attempting to meet this defense appellees' brief urges that Dr. Leake testified to the deficiencies of the prior art and the success of the patented process (p. 26) and that the evidence showed that whereas plasma was not available to the soldiers in World War I it was available in World War II (p. 27). Such evidence is only available to evidence invention where invention is in doubt. (*Dow Chemical Co. v. Halliburton Oil Well Cementing Co.*, 324 U. S. 320, 89 L. Ed. 973.) That is not the case here, where appellant contends that invention is lacking under the law beyond any reasonable doubt. Further, the evidence in this case falls far short of proving that commercial success which would in fact evidence invention in the proper case. While Dr. Leake testified to the use of the so-called Reichel process to freeze-dry plasma during the late war, Dr. Reichel testified [R. 207] that this was but one of the ways to distribute plasma, and the uncontroverted evidence of Dr. Ward shows that plasma itself, however distributed, was not generally accepted by the medical profession until the end of the 1930's [R. 348-353]. There was no demand for plasma during the first World War and, indeed, the record is singularly barren of any prominent commercial use whatsoever of the so-called Reichel process between 1933, the date of the alleged Reichel invention, and World War II when, and only when, there arose the demand for extensive plasma distribution.

Appellees further argue that in claims 6 and 12 of the Reichel patent Reichel defines a process having four steps

never before combined, appellees setting forth these steps as (1) freezing; (2) subjecting the frozen material to a high vacuum while (3) heating the frozen material (4) without melting or softening thereof (p. 42). The only support for this contention set forth in appellees' brief is that Dr. Leake testified that one of Reichel's significant contributions to the pharmaceutical art was his "insistence upon maintaining the product in a solid state while the heat was being applied" (p. 44); that the Elser patent [Deft. Ex. G-7, pp. 681-688] did not disclose the four steps of claims 6 and 12; and that the art did not show said steps in combination.

Concerning Dr. Leake's testimony, appellees simply ignore his admissions of record. Dr. Leake early in his testimony admitted that heating the product during desiccation was old [R. 84]. Under cross-examination, after being confronted with the prior art, he admitted that Reichel was not the first one to keep the product frozen solid during desiccation [R. 146-147]. He testified to the following question:

"Q. So then the new factor which he brought in, as I understand your testimony, was that after sublimation was complete he raised the temperature of the material so as to get this dry product? A. Yes, sir."

To the questions of the court below:

"Q. Hadn't both of those processes been discussed and some of them applied in some fields of biological drying? A. Not in the latter one at all, sir."

Q. The first one had? A. The latter one came as a considerable surprise to many of the workers in the field, that it was possible to maintain the product in a solid condition while heat was applied to it to drive off *residual moisture*." (Emphasis ours.)

(The latter answer obviously concerns the limitations of claims 11 and 13, omitted in claims 6 and 12.)

It is clear that if Dr. Leake's testimony meant anything, it meant that whereas heating while keeping the product solid under vacuum during desiccation was old, no one prior to Reichel had specified keeping the product solid as absolutely necessary to freeze drying. It is submitted that this court will readily recognize that merely emphasizing that which was old in the art does not form the basis for sustaining the patent monopoly, especially where the art, as shown clearly by the record and by appellant's opening brief, was replete with this teaching. Further, the prior art of record makes it perfectly clear that not only was every step of claims 6 and 12 set forth in the prior art, but such steps were set forth in combination just exactly as set forth in the claims. While appellees assert that the Elser modification does not set forth this process, only the most superficial reading of such patent will sustain this view. In describing the very objects and basic nature of his patented process (Elser Pat. p. 1, col. 1), Elser states that this invention is concerned with conditioning liquids and semi-solid materials without alteration in their essential properties. He states (lines 23-38):

"It has likewise been established that if, prior to and during the operation of withdrawing the water from the material, such water be segregated from the tissues and cells so far as possible, then can its evaporation occur without deterioration. To this

end, the material is, as a preliminary step, chilled below the freezing point of water; the chilling being performed expeditiously with the object of segregating the water in the form of crystals as minute as possible. *If this condition be maintained until the water has completely been removed by evaporation of these ice crystals, and if the evaporation be caused to take place expeditiously, it is certain that no deterioration will result.*" (Emphasis ours.)

He states, in describing his process, that the water vapor is evolved from the "frozen serum" (p. 1, col. 2, line 97). He thereafter describes one modification of apparatus to be used with his process and then, on page 3, describes a modification which may be used to handle larger quantities of the material. On page 3, column 1, lines 25 to 34, Elser says:

"The product to be dried is placed in the pans 21 within the drying chamber and the latter connected to the pumping apparatus by means of the conduit 3' and the entire system evacuated. As evacuation proceeds the gases contained in the product are liberated and escape with the air and when the vacuum therein reaches a certain value, boiling of the *liquid* occurs which is followed by *freezing* brought about as the result of rapid evaporation." (Emphasis ours.)

Thereafter he states (lines 44 to 52):

"So that the temperature of the product does not reach a value so low as to impede vaporization of the *liquid* heating means may be provided, such as the lamps 22, for maintaining a given temperature in the lower areas of the drying chamber 20 to counteract the cold transmitted to the product by the chilled top surface of the tank, and the cold caused by the evaporation of the *liquids*." (Emphasis ours.)

Obviously the word “liquids” as used in this paragraph designates the original product as it was before freezing and is not intended to describe the condition of the substance during desiccation; otherwise Elser’s description would mean that the material to be treated was first frozen under vacuum and then permitted to melt during desiccation, a result ridiculous in view of his description of the basic nature of his process, *i. e.*, that “this condition (frozen) be maintained until the water has *completely been removed by evaporation of these ice crystals.*” (Emphasis ours.) The fact is, as stated in the patent, Elser uses the lamps 22 to prevent the material from becoming so cold as to slow down sublimation of the ice therein. This is precisely the reason for heating in the so-called Reichel process [R. 195], and is necessary from the standpoint of time in the modification of Elser because such modification is designed to desiccate “larger quantities of the mixture” (p. 3, col. 1, line 13).

And if the Elser disclosure were not enough, resort may be had to Defendant’s Exhibit F-14 [R. 597]. Here Craigie, writing for the British Journal of Experimental Pathology, sets forth [R. 598, 599] the freeze drying of guinea pig serum. He states that the complement is frozen while being subjected to a high vacuum, that the apparatus is left at room temperature and that the complement will remain frozen until dry as a result of the evaporation of the water. Thus, the four steps stated by appellees to be defined in claims 6 and 12 are present in Craigie in precisely the combination of Reichel. These steps (Appellees’ Brief p. 42) are (1) freezing (found in Craigie), (2) subjecting the frozen material to a high vacuum (found in Craigie), (3) while heating the frozen material (Craigie exposes his desiccating container to the atmosphere as specified in claims 6 and 12), (4) without

melting or softening thereof (Craigie describes how the vacuum evaporation of the water automatically keeps it several degrees below 0°C.). The fact that Craigie places his material in a dish supported by a wire frame within the desiccating container to partially isolate the substance from heat conduction does not mitigate from the fact that the container is exposed to the atmosphere, thus permitting the material to receive heat through radiation. If Craigie had desired to avoid all heat addition to the material and thus slow desiccation, he would have used a refrigerant bath about the container, as did Shackell [Deft. Ex. F-5, R. 533].

Finally, appellees assert patentability for claims 11 and 13, stating that the four steps therein set forth constitute a process never before combined, and that in this process Reichel was the first to combine the “fifth step,” *i. e.*, that of finally heating the desiccated product to above 0°C. under vacuum in the freeze drying process. Appellees’ brief admits that such fifth step is not new *per se* (Brief p. 50), but appellees point to the fact that Dr. Leake testified that this fifth step was a contribution of Reichel (p. 44) and that Dr. Hildebrand admitted it was not shown with freeze drying in the prior art (p. 27).

It is submitted that appellees misconceive the entire purport of the law on aggregation and the cases setting forth this principle. To sustain claims 11 and 13 the alleged process therein set forth must be shown to have resulted in something new and different. As shown by the authorities cited in appellant’s opening brief, a mere aggregation of result is not sufficient. In the instant case claims 11 and 13 but set out the old freeze drying process, and thereafter set forth that the product should be heated under vacuum to above 0°C. This was shown in

appellant's opening brief to be but drying by an old process and drying further and more completely by adding an old vacuum drying step, admittedly known long prior to Reichel. Nothing appellees have said and no evidence to which appellees have been able to refer shows wherein any result different in kind is achieved in the asserted combination of steps of claims 11 and 13. No authority has been cited by appellees which meets appellant's showing of non-inventive aggregation. To urge that the combination defined in claims 11 and 13 is simply a new combination merely begs the question, and it is submitted that these claims merely set forth an aggregation and, along with claims 6 and 12 and along with the other claims of the Reichel patent purportedly setting forth the so-called Reichel process are clearly and beyond any reasonable doubt invalid.

2. Appellees Have Failed to Point Out Why Claims 6, 11, 12 and 13 of the Reichel Patent Should Not Be Declared Invalid as Incomplete, in Failing to Set Out the Five Essential Steps of the Reichel Process.

Appellees' entire case on the validity of the Reichel patent was based upon the extolling by Dr. Leake of the so-called Reichel process, a process which Dr. Leake testified unequivocally consisted of five steps, all essential to obtaining a satisfactory lyophilized product [R. 132]. Nowhere did Dr. Leake testify as to any practicable value, merit or contribution by Reichel existing in two separate and distinct processes not including all the five steps of the Reichel process. When Dr. Leake stated [R. 148] Reichel made two main contributions, he was talking about one single process, the five-step Reichel pro-

cess, and nothing stated by any of the other witnesses at the trial can be used as a basis for distinguishing the instant case from *Graver Tank and Mfg. Co. Inc., v. Linde Air Products Co.*, 93 L. Ed. Adv. Op. 492, cited previously by appellant.

Appellees can only urge that Dr. Hildebrand stated the process consisted of three steps, and that the authorities show that sub-combination claims are proper. So far as concerns Dr. Hildebrand's testimony, he was testifying as to the Reichel patent disclosure as compared with the prior art and corresponding steps of appellant's processes, and not as to what was essential to the preparation of a successful lyophilized product by the so-called Reichel process. Nor was he testifying whether claims 6, 11, 12 and 13 set forth the steps designated by Dr. Leake without contradiction as essential [R. 270]. So far as concerns the authorities cited by appellees, which admittedly justify in the proper case sub-combination claiming, these cases are simply not in point here. The material issue is whether or not the claims of the patent sufficiently define those steps essential to the process which Dr. Leake testified made it possible to obtain a satisfactory lyophilized product. Appellees have pointed to not one iota of evidence from which it could be inferred that Reichel's process could result in a satisfactory lyophilized product in the absence of those steps omitted in claims 6, 11, 12 and 13. It is submitted, therefore, that beyond any question of doubt those claims are incomplete under the law and therefore are invalid.

3. Appellees Have Failed to Point Out Wherein Claims 11 and 13 Should Not Be Held Invalid as Failing to Define the Metes and Bounds of the Reichel Monopoly and as Therefore Vague and Indefinite Under the Applicable Rules of Law.

Appellees state that there is evidence to support the conclusion that the Reichel patent complies with every requirement of R. S. §4888, 35 U. S. C. A. §33, but what this evidence is and how any inference can be drawn therefrom that the metes and bounds of the Reichel monopoly are sufficiently defined in the claims in issue as required by the cases heretofore cited by appellant appellees do not say. From appellees' argument it can only be concluded that appellees urge that this court hold that the step of quickly or instantaneously freezing need not be susceptible of definition at all.

In its opening brief appellant pointed out how not a single witness was able to specify what instantaneous freezing meant and whether, in a given situation, such freezing would be present or would not be present. (Appellant's Brief pp. 45, 46 and 47.) Appellees refer only to the testimony of Dr. Leake at R. 134, but it is impossible to infer anything from this testimony but that Dr. Leake simply was unable to ascertain what would be instantaneous freezing and what would not be instantaneous freezing. Indeed, Dr. Leake's testimony as to this point given at R. 134-137 was summed up by Dr. Leake when he testified, at R. 137:

"* * * You would say that isn't necessary to the Reichel process, would you, Doctor? A. What?

Q. What I read. I mean this instantaneous freezing. A. I don't think that is an essential feature of the Reichel process. The essential feature of the Reichel process is to freeze the product."

Despite the specifications of the patent in suit, which refer to instantaneous freezing no less than five times, and despite that claims 11 and 13 of the patent expressly set out such instantaneous freezing, this appears also to sum up the argument of appellees, namely, that the step of instantaneous freezing is not essential to said claims.

Indeed, that claims 11 and 13 are hopelessly deficient in setting forth the metes and bounds of the claimed patent monopoly is emphasized by appellees' argument on the issue of infringement, to be considered in the next section of this brief. This argument rejects every attempt of appellant to find some standard in the patent claims which might be applied to appellant's processes, but offers none of its own.

Claims 6 and 12 of the Reichel patent specify "quickly freezing" and claims 11 and 13 specify "instantaneous freezing." If indeed the term "quickly freezing" is susceptible of any definite interpretation such claims are clearly invalid as defining an old process in view of the Elser patent and the Craigie article, and for the reasons set forth hereinabove. The metes and bounds of claims 11 and 13, which specify "instantaneous freezing" are impossible to ascertain, and these claims are, beyond any question of doubt, invalid as indefinite.

4. Appellees Have Failed to Point Out Wherein Any Inference Can Be Drawn From the Proofs That Would Establish Infringement of Claims 6, 11, 12 and 13.

In its opening brief appellant attempted to set forth some possible standard whereby the claims of the patent in suit might be applied to appellant's processes. The testimony of Drs. Leake and Hildebrand was of no assistance in this matter, as neither could define what the terms quickly and instantaneously freezing meant. Dr. Reichel, although unable to definitely apply his test, stated that he meant by instantaneous or rapid freezing freezing as fast as possible. And resort to the specifications of the patent itself construes the terms to mean, if anything, freezing in instalments or by rotation at a temperature far below the freezing point of the material, *i. e.*, about -70°C . or below the temperature of dry ice, in order that the component parts of the colloidal system be permanently fixed and that the structure of the colloidal particles remain apparently unchanged.

Appellant showed how the great majority of appellant's processes fulfilled none of these conditions and how no process of appellant fulfilled all of these conditions, and urged that appellees had beyond any question of doubt failed in their proofs of infringement.

Appellees in their brief take the position simply that upon the admission by appellant that all of its freezing was at temperatures not higher than -20°C . it cannot be said the jury acted unreasonably in finding that such freezing met the requirements of the claims in suit. In view of the well settled law that omission of an element of a claim avoids infringement, appellant submits that the issue of infringement should never have gone to the jury.

In order to determine whether or not appellees' case on infringement was entitled to go to the jury, it was the duty of the court below first to construe the terms "quickly" and "instantaneous" freezing in the claims. This was but a matter of construction of the patent document and was not within the province of the jury. (*Doble Engineering Co. v. Leeds & Northrup Co.*, 134 F. 2d 78 (C. C. A. 1); *Motor Wheel Corporation v. Rubsam Corporation*, 92 F. 2d 129 (C. C. A. 6); *Burroughs Adding Mach. Co. v. Rockford Milling Mach. Co.*, 292 Fed. 550 (C. C. A. 7). Thereafter it was the duty of the court below to examine the proofs and determine whether those proofs permitted any reasonable inference that appellant's processes came within the terms "quickly" and "instantaneous" as construed by the court. The court below failed to set out any construction of these terms [R. 973-999], and in view of such failure this function must be performed by this court. (*Refrigeration Patents Corporation v. Stewart-Warner*, 150 F. 2d 972 (C. C. A. 7).)

As stated above, appellant has suggested in its opening brief that if it is possible to ascertain the meaning of the aforesaid terms their meaning is established by the specification of the patent and by the patentee himself, which is instalment or rotation freezing in as short a time as possible by the use of a refrigerant at temperatures far below 0°C. Appellees, on the other hand, suggest no possible definite meaning for the terms.

Appellees in their brief merely say, first, that claim 11 of the Reichel patent specifies one way of freezing, *i. e.*, "by indirect contact with a refrigerant maintained at a temperature below the freezing point" (p. 31). Such statement is manifestly misleading. Freezing by indirect contact with a refrigerant could be slow freezing, medium

freezing or instantaneous freezing, and the fact of indirect contact has nothing to do with the rate of freezing itself.

Second, appellees argue that the time of freezing has nothing to do with the matter inasmuch as a large batch of material subjected to the same conditions as a smaller batch would, of course, take longer to freeze (pp. 31 and 54). Appellees' observations regarding the Chinese nation seem to urge that any freezing is instantaneous and to reject entirely the emphatic teachings of the Reichel patent itself. This appears to but reiterate the proposition that quickly or instantaneous freezing may be read out of the claims entirely. Besides the obvious fact that the terms "quickly" and "instantaneous" are terms of time duration, the answer to this argument is that the patent itself specifies that freezing take place in instalments or by rotation, thus bringing about the instantaneous freezing of small amounts of the material at a time, and the patent nowhere suggests freezing large batches simultaneously. If appellant were practicing the method of the patent in suit, as appellees assert, the proof should show more than that but one of appellant's 13 products was frozen by rolling, and that none of appellant's 13 products was frozen by instalments.

Third, appellees present, as evidence of what the term "quickly" means, prior art, such as the Elser patent, describing freezing with a refrigerant between -12° and -20°C . as "rapid freezing" (p. 31), but in the very prosecution of the Reichel patent it was urged that the -20°C . freezing of the Elser process was "slow freezing," whereas applicant's process constituted "rapid freezing" [Def't. Ex. B, R. 412]. Further, as the specifications of the Reichel patent make clear, the temperature

of the refrigerant used is but one of the factors in quickly or instantaneously freezing. For example, the freezing of a roomful of material by subjection of that material to a single pipe running through its mass carrying a -70°C . refrigerant would take considerable time, if it could be accomplished at all, whereas splashing of a droplet of the mass on such pipe, even were the refrigerant at a considerably higher temperature, would certainly result in a freezing of such droplet in immeasurably less time. This is what the Reichel patent means by instalment freezing. And, finally, claims 11 and 13 of the Reichel patent specify neither “rapidly” nor “quickly.” They specify instantaneously.

Fourth, appellees argue that Dr. Hildebrand admitted that in the frozen food industry the term “quick frozen” has a definite meaning (pp. 30, 31 and 53). Reference to Dr. Hildebrand’s testimony in the record will demonstrate the fact that Dr. Hildebrand made no such alleged admission, were such admission material here [R. 298].

And, finally, appellees urge that since some of the claims of the Reichel patent specify -70°C . for the refrigerant, the patentee, Reichel, must have meant something different in claims 6, 11, 12 and 13 (p. 31). Doubtless Dr. Reichel did indeed mean something different. He testified that he meant as fast as possible [R. 196]. But aside from Dr. Reichel’s testimony appellees offer no suggestion whatsoever as to what the terms “quickly” and “instantaneously” do mean in claims 6, 11, 12 and 13.

It thus appears that nothing offered by appellees in their brief is of assistance in the ascertainment of just what the aforesaid limitations in the Reichel claims mean. It also appears that appellees have suggested nothing to rebut the plain showing of appellant that its processes do

not fall within any possible definitely ascertainable construction of the said terms. From the standpoint of time appellant has demonstrated that the proofs do not show that its products were frozen either quickly or instantaneously, Penicillin, representing 75% of the total sales of appellant, being frozen in times ranging from 2 to 16 hours. From the standpoint of manner of freezing, appellant has shown that but one of 13 of its products was frozen by rotation and none by instalments, and from the standpoint of refrigerant temperature appellant has shown that but 1/50th of its products were subjected to the -70°C . temperature. Beyond any reasonable doubt appellees' case of infringement has failed.

Flosdorf, et al., Patent:

Nothing has been said by appellees which might justify the sending to the jury of the issue of validity of claims 4 and 5 of the Flosdorf *et al.* patent. Appellees only urge that the consideration of the merits of the Flosdorf *et al.* invention before the Patent Office was very thorough and that appellant nowhere names the machine of which the processes of claims 4 and 5 of the Flosdorf *et al.* patent are supposed to be a mere function or effect. Appellees misinterpret appellant's position. Appellant pointed out in its opening brief that claims 4 and 5 merely set out the function and effect of the apparatus disclosed in the Flosdorf *et al.*, patent. that all the witnesses agreed that the step in the patent of removing the vapor from the vacuum chamber without condensing it in a cold condenser or in a chemical desiccant merely de-

scribed the function of the pumps Flosdorf disclosed in his patent, and that on their faces claims 4 and 5 of the patent but describe the very object or result which the patent description itself specified as the object of the alleged invention, *i. e.*, to desiccate without using a cold condenser or a chemical desiccant. Appellees' observation that the combination of the Flosdorf *et al.* patent was novel and produced a result not thought possible by the art does not mitigate from the fact that claims 4 and 5, under the law, may not claim such result. The result which the patent on its face asserts was thought impossible was desiccating without a cold condenser or a chemical desiccant, precisely that which Flosdorf claimed. Whether the particular pumps of Flosdorf may or may not have permitted use of a lower vacuum during freeze drying is immaterial. The subject is not mentioned in the record, in the claims, or in any way in connection with appellant's processes.

Claims 4 and 5 of the Flosdorf *et al.* patent are so plainly invalid as to merit no further discussion.

III.

Misuse of the Patents in Suit.

Appellees concede on page 57 of their brief that appellant's misuse argument is based upon good law. In an attempt to establish that the patents in suit have not been misused, however, appellees set forth a number of facts which they contend render the rules of law urged by appellant inapplicable. Appellees urge:

1. That the principals of the patent pool were not in active competition at the time the pool was formed.
2. That the evidence fails to establish that competition was lessened or destroyed by the patent pool.
3. That appellees' licensing program is nonrestrictive and non-discriminatory.
4. That appellees' patent pool furthered the public policy of the patent laws.
5. That since the creators of the instant patent pool were not present competitors and since price fixing is absent, *United States v. Line Material Co.*, 333 U. S. 287, 92 L. Ed. 701, is not applicable here.

Appellant will show that the first of these propositions is utterly immaterial, that the second is not only immaterial but, in addition, is not supported by the record, that the third has no bearing on the questions presented, that the record before the court in no way justifies the fourth, and that the fifth represents misunderstanding of the cited authority.

1. Whether or Not the Principals to the Patent Pool Were in Active Competition at the Time the Patent Pool Was Formed Is Immaterial to Their Patent Misuse; the Pool and Agreements on Their Face Restrain Potential Competition and Are Illegal Per Se.

As their principal argument appellees urge throughout their brief that their patent pool does not violate the antitrust laws nor constitute a misuse of their patents inasmuch as prior to the questioned agreements the parties thereto were not in active competition with each other. It is apparently appellees' contention that, so long as the parties to a combination are not at the time of the formation of that combination in actual and active competition, such combination does not fall within the scope of the antitrust laws. Appellees cite no authority whatsoever for this proposition and it is not the law. It has been repeatedly held that a combination whose purpose or effect is to impede potential or future competition is prohibited by the antitrust laws. Thus, in *United States v. Griffiths*, 334 U. S. 100, 92 L. Ed. 1237, the Supreme Court had before it an agreement between Moving Picture Theatres Owners wherein:

"With minor exceptions the theatres which each corporation owns do not compete with those of its affiliates but are in separate towns." 334 U. S. 102, 92 L. Ed. at 1240.

Despite this fact the Court held:

"It is indeed 'unreasonable, *per se*, to foreclose competitors from any substantial market.' *International Salt Co. v. United States*, 332 U. S. 392, 396, *ante*, 20, 26, 68 S. Ct. 12. The anti-trust laws are

as much violated by the prevention of competition as by its destruction. *United States v. Aluminum Co. of America (F) supra.*” 334 U. S. at 107, 92 L. Ed. at 1243.

And in *American Tobacco v. United States*, 328 U. S. 781, 90 L. Ed. 1575, the Supreme Court said:

“On March 26, 1945, this Court granted the petitions but each was ‘limited to the question whether actual exclusion of competitors is necessary to the crime of monopolization under Sec. 2 of the Sherman Act’.” 328 U. S. at 784, 90 L. Ed. at 1580.

Answering this question the Court held:

“Prevention of all potential competition is the natural program for maintaining a monopoly here, rather than any program of actual exclusion. ‘Prevention’ is cheaper and more effective than any amount of ‘cure’.” 328 U. S. at 797, 90 L. Ed. at 1587.

In a recent case by the Court of Appeals for the Second Circuit, Judge Learned Hand said:

“* * * and, so far as concerns the public interest, it can make no difference whether an existing competition is put an end to, or whether prospective competition is prevented.” *United States v. Aluminum Co. of America*, 148 F. 2d 416, 429.

It should be noted that the Supreme Court in the *American Tobacco Co.* case, *supra*, not only cited the *Aluminum Company* case with approval, but emphasized that the unique nature of the proceedings therein added to its weight as a precedent.

Actual or present competition between the contracting parties has never been held to be a condition precedent to

patent misuse. This court has recently had before it a case involving an agreement held to have constituted a patent misuse wherein the parties to the agreement were not competitors. *McCullough v. Kammerer Corp., et al.*, 166 F. 2d 759. In that case one of the parties to the agreement, Kammerer, was merely a patent holding corporation, while the other party to the agreement, Baash-Ross, was a manufacturer. As pointed out in the dissenting opinion:

“The admitted fact is before us that Kammerer never had a field of operations and it never competed or attempted to compete with anyone. It was apparently a ‘paper corporation’ expressly created for the one and only purpose of holding the Kammerer patent or patents here involved—it was not, and never was, a manufacturing and/or selling company.” 166 F. 2d at 768.

In discussing this case, appellees’ brief erroneously states (p. 35) that the corporation was formed “by concert among competitors.”

As clearly established by the above authorities, however, the antitrust laws are applicable to combinations which are intended to, or which do, prevent future competition as well as to those which suppress existing competition. The repeated urgings by appellees in their brief that Sharp & Dohme and Stokes were not competitors at the time their patent pool was formed have, therefore, no bearing whatsoever on the questions here presented.

2. The Facts Before This Court Show That the Pool and Agreements Do Lessen and Destroy Competition, Although Such Showing Is Unnecessary Where the Said Pool and Agreements Are Illegal on Their Face.

Appellees' brief urges that the misuse defense must fail inasmuch as the record fails to show specific instances of the lessening or removal of competition due to the patent pool. It is apparently appellees' contention that absent the proof of such instances a patent misuse defense must fail. This is not the law. That an agreement on its face may violate the antitrust laws or constitute a patent misuse has long been settled. It was under such circumstances that this court decided the case of *McCullough v. Kammerer Corp.*, *supra*.

In its opening brief appellant has shown that the purpose and effect of the appellees' patent pool was to eliminate all competition, present and future, between the patent owners, to allocate to each separate fields of operation within the industry and to be self-perpetuating. Such an agreement, on its face, violates the antitrust laws and constitutes a misuse of the patents involved.

In addition, the facts before this court amply demonstrate that appellees' combination has suppressed competition and has restrained trade. As shown by the agreements themselves and as pointed out in appellees' brief, the research activities of the parties to the agreements overlapped (p. 37). Each of the principals to the pool was actively engaged in research in the field of the other. The efforts of each party could well be expected to and did result in patentable inventions in the field of the other. Were either of the parties to make an important invention in the other's field the protection offered by a patent covering such invention would be the strongest incentive for ac-

tually entering that field. Yet, as pointed out by appellees in their brief, the principals in the pool "are not now competitors" (p. 36). The pooling agreement insured such result.

Further, were any showing of specific trade restraint necessary other than the obvious division of the field of competition, the dominance of appellees in the freeze drying industry provides such showing. Appellees admit their dominance and assign its existence to their patents. In this appellees misconceive the purport of appellant's argument. Appellant's position is that it is unlawful and a patent misuse for patent owners to combine and pool their patents where such pooling results in domination of the particular industry. This even in the absence of a division of the field between the parties such as here took place.

Demonstrating appellees' misunderstanding of the consequences of its monopoly are the statements in appellees' brief relating to the testimony of Mr. Kerr (p. 60). Appellant's reference to such testimony was to show how a dominant combination had within its power the ability to arbitrarily fix prices through the setting of royalty rates, whether such royalties be high or low. The iniquity is not in the price of the royalty, it is in the power to fix such prices.

Thus, even were the facts of actual restraint as set forth hereinabove missing, appellees' pooling of their patents to attain a position of monopolistic domination of the industry is illegal, whether or not the actual royalty charges leveled against the industry be high or low.

As stated by the Supreme Court in *American Tobacco Co. v. United States*, 328 U. S. 780, 811, 90 L. Ed. 1594-1595:

“It is undoubtedly true * * * that trade and commerce are ‘monopolized’ within the meaning of the federal statute when, as a result of efforts to that end, such power is obtained that a few persons acting together can control the prices of a commodity moving in interstate commerce. It is not necessary that the power thus obtained should be exercised. Its existence is sufficient. *United States v. Patten* (C. C.) 187 F. 664, 672, reversed on other grounds in 226 U. S. 525, 57 L. Ed. 333, 33 S. Ct. 141, 44 L. R. A. (N. S.) 325. Cf. *North American Co. v. Securities & Exchange Commission*, 327 U. S. 686, *ante*, 945, 66 S. Ct. 784.”

(See also *Fashion Originators' Guild v. Federal Trade Com.*, 312 U. S. 457, 467, 85 L. Ed. 949, 954.)

And in *Associated Press v. United States*, 326 U. S. 1, 12, 89 L. Ed. 2013, 2026, the court said:

“Combinations are no less unlawful because they have not as yet resulted in restraint. An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be ‘wholly nascent or abortive on the one hand, or successful on the other’.”

3. Whether or Not Appellees' Licensing Program Is Non-restrictive and Non-discriminatory Is Immaterial to the Issue at Hand.

Appellees urge that their licensing program is nonrestrictive and nondiscriminatory. Appellant has established that the formation of the patent pool itself violated the antitrust laws and constituted a misuse of the patents. Appellant further has established that the division of the field between the principals to the pool is illegal in and of itself. So long as appellees continue to operate under the agreements creating such pool they cannot maintain any action for infringement of their patents. The licensing policy of the parties to the agreement subsequent to the formation of the pool has no bearing whatever on the legality of the agreements under which they operate. Appellant knows of no cases, and appellees have cited none, where an illegal patent pool or restrictive agreement among patent owners has been sanctioned simply because its current licensing program was nonrestrictive and non-discriminatory.

4. The Record Before the Court Does Not Support Appellees' Assertion That the Patent Pool Furthered the Public Policy of the Patent Laws.

Appellees' brief (p. 57) characterizes the patent pool as "a co-operative research venture" and urges that such venture has furthered the public policy of the patent law. Appellees' contention appears to be that their patent pool, in some unexplained manner, increased the research activities of the parties thereto. There is nothing in the series of agreements or in the record which even remotely supports such a contention.

Again, appellees' brief urges (p. 37) that inasmuch as the research activities of the parties prior to the agreement resulted in the making of inventions in each other's field, under such circumstances a patent pool was not only permissible, but desirable. In support of this proposition appellees cite the case of *Standard Oil Company v. United States*, 283 U. S. 163, 75 L. Ed. 926. If the mere fact that parties to a patent pool were engaged in research in a common field were sufficient to justify such pool the anti-trust laws would obviously have little or no application to patent pool combinations. The *Standard Oil Company* case, rather than supporting appellees' contention, opposes it. The case goes no further than to hold that where patent owners have conflicting claims or threatened interferences, a patent pool formed to resolve their disputes is not conclusively illegal, provided that the members of the pool do not dominate their particular market. In the instant case, appellees have failed altogether to establish that there were any patent disputes between the parties to the pool and admit domination of the field.

Next, appellees' brief urges (p. 37) that the patent pool "opened up to the entire pharmaceutical industry the processes and products patented." This contention is similarly without foundation. It nowhere appears in the record how the pharmaceutical industry in any way benefited from the formation of the patent pool. On the contrary, the pool has resulted in an admitted patent domination of the field and has given the participating parties thereto the absolute and arbitrary power to jointly set the royalties throughout the industry.

5. **United States v. Line Material Co.**, 333 U. S. 287, 92 L. Ed. 701, Controls Here, Regardless of Whether Active Competition Existed Between the Parties to the Pool and Regardless of Whether Under the Pool Prices Have Been Finally Fixed.

Appellees seek to summarily distinguish the instant case from the *Line Material* case on two grounds. First, that in that case the members of the patent pool were competing manufacturers prior to the creation of the pool; second, that through the pool prices were fixed for the licensed product.

Appellant has herein shown that the mere fact that prior to the formation of a combination among traders they were not in active competition with each other will not remove such combination from the scope of the anti-trust laws. As regards the fixing of prices of the licensed product in the *Line Material* case, appellees have chosen to ignore entirely the postulate that any combination which eliminates all competition among its members must necessarily eliminate price competition. This is made clear by the Supreme Court of the United States in *American Tobacco Company v. United States*, 328 U. S. 781, wherein the Court states, 328 U. S. at 813, 90 L. Ed. at 1596, quoting from *United States v. Aluminum Co. of America*, 148 F. (2d) 416:

“Starting, however, with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would dis-

appear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies. *Id.*, 427, 428.”

The simple fact is that in the *Line Material* case the parties pooled their patents and then eliminated one element of competition between themselves by fixing prices; here the parties pooled their patents and then totally obliterated any competition whatsoever between themselves by dividing the field into exclusive spheres of activity.

6. Appellees Have Wholly Failed to Justify the Provisions of Their Agreements Providing for the Perpetuation of the Pool.

Finally, respecting the scheme to perpetuate the patent concentration of the pool, appellees' brief merely states (p. 58) that, since a research program necessarily looks to the future, the patent pool provides for the disposition of future patent rights. Such statement is applicable to any scheme for perpetuation of patent domination, is no answer to the authorities cited in appellant's opening brief, and in no way justifies either the pool, the illegal agreement, or the perpetuation thereof.

Respectfully submitted,

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